

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs March 28, 2006

STATE OF TENNESSEE v. JOEL LESLIE BOOKER, SR.

**Appeal from the Criminal Court for Sullivan County
No. S49,725 R. Jerry Beck, Judge**

No. E2005-01221-CCA-R3-CD - Filed April 12, 2006

The defendant, Joel Leslie Booker, Sr., was charged with violating the Motor Vehicle Habitual Offender (MVHO) Act while on probation for a previous violation of the same act. The defendant pled guilty to the second count with the understanding that he would ask for probation, and the trial court would hold an alternative sentencing hearing. The trial court denied the defendant's request for alternative sentencing. On appeal, the defendant argues that the trial court erred in denying his request. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which ALAN E. GLENN, and J. C. McLIN, JJ., joined.

Joseph F. Harrison, Blountville, Tennessee, for the appellant, Joel Leslie Booker, Sr.

Paul G. Summers, Attorney General and Reporter; Rachel E. Willis, Assistant Attorney General; Greeley Wells, District Attorney General; and James F. Goodwin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant pled guilty to violating the MVHO Act. The State and the defendant agreed to the following stipulation of facts:

On or about August 28th, 2004, at approximately 1015 hours, Central Dispatch for the Bristol Tennessee Police Department transmitted a call in reference to an intoxicated male driving a black BMW, Tennessee Registration DKN-050 on Old Thomas Bridge Road in Sullivan County. At approximately 1020 hours, Officer Debbie

Richmond McCauley of the Bristol Tennessee Police Department observed the same above-described vehicle traveling east on Old Thomas Bridge Road, two car lengths away from the stop sign at the Old Thomas Bridge Road and Highway 11-E. As Detective, or Officer McCauley, passed the suspect's vehicle, she was approximately three feet away from the vehicle . . . excuse me, away from the subject, the driver, later identified to be the Defendant, Joel Booker. She got a good look at Mr. Booker's face. His hair was messy. His eyes were bloodshot. She observed and heard Mr. Booker squeal the tires on the vehicle. She exited her unmarked vehicle, walked to the Defendant's vehicle's driver's door, and asked him to pull the vehicle to the side of the road. As Mr. Booker spoke to the officer, she noticed that his speech was slurred. She asked Mr. Booker to exit the vehicle. She could not smell any alcohol on his breath. Mr. Booker admitted that he had drank four or five beers since last night, were his words. Officer Richmond McCauley asked Mr. Booker to perform field sobriety tests. He stood on one leg for ten seconds. Mr. Booker stated that he could not perform any more sobriety tests, because he was paralyzed on the left side of his body due to back surgery. Mr. Booker then showed Officer McCauley a scar that ran down the spine area on his back.

Central dispatch checked Mr. Booker's driving status, which came back to be revoked or H.T.O. Mr. Booker admitted that he had just gotten out of jail and was on probation. In addition, he admitted that he knew he was revoked H.T.O. and not supposed to be driving. Officer McCauley observed a spotlight in the rear floorboard of Mr. Booker's vehicle. Mr. Booker admitted that he drove around and needed the spotlight to help other drivers in need. Even though Mr. Booker admitted that he had been drinking alcohol, Detective Richmond McCauley did not believe him to be intoxicated; therefore, he was only charged with driving as a Habitual Traffic Offender.

On November 9, 2004, the defendant was indicted by the Sullivan County Grand Jury for one count of violating the MVHO Act. The defendant pled guilty to the Class E felony, through an Alford¹ Plea. He agreed to a two year sentence as a Range II offender. As a part of his plea agreement, the defendant applied for alternative sentencing. The trial court held an alternative sentencing hearing on May 19, 2005. The trial court denied the defendant's request for alternative sentencing at the conclusion of this hearing. His sentence was imposed on May 20, 2005. The defendant filed a timely notice of appeal.

ANALYSIS

¹ This type of plea is named after North Carolina v. Alford, 400 U.S. 25 (1970), in which the United States Supreme Court discussed the right of an accused to plead guilty in his best interest while professing his actual innocence.

The defendant's sole argument on appeal is that the trial court erred in denying him probation or alternative sentencing. "When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. Tenn. Code Ann. §§ 40-35-103(5), -210(b); Ashby, 823 S.W.2d at 169. We are to also recognize that the defendant bears "[t]he burden of showing that the sentence is improper." Ashby, 823 S.W.2d at 169.

In regards to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration.

A defendant who does not fall within this class of offenders "and who is an especially mitigated offender or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). Furthermore, unless sufficient evidence rebuts the presumption, the trial court must presume that a defendant sentenced to eight years or less is an offender for whom incarceration would result in successful rehabilitation. State v. Byrd, 861 S.W.2d 377, 379-80 (Tenn. Crim. App. 1993); see also Tenn. Code Ann. § 40-35-303(a).

The defendant herein pled guilty to violating the MVHO Act, a Class E felony, as a Range II offender. Thus, the defendant was not presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). Nevertheless, because the defendant was convicted of a Class E felony and sentenced to fewer than eight years for the offense, the defendant was eligible for probation. See Tenn. Code Ann. §§ 40-35-102(6) & -303(a); Byrd, 861 S.W.2d at 379-80. However, all offenders who meet the criteria are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. See State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986)). Even if a defendant is presumed to be a favorable candidate for alternative sentencing under

Tennessee Code Annotated section 40-35-102(6), the statutory presumption of an alternative sentence may be overcome if:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant

Tenn. Code Ann. § 40-35-103(1)(A)-(C). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated section 40-35-103(5), which states, in pertinent part, “[t]he potential or lack of potential for the rehabilitation or treatment of a defendant should be considered in determining the sentence alternative or length of a term to be imposed.” Tenn. Code Ann. § 40-35-103(5); State v. Dowdy, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant’s untruthfulness and lack of candor as they relate to the potential for rehabilitation. See State v. Nunley, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); see also State v. Bunch, 646 S.W.2d 158, 160-61 (Tenn. 1983); State v. Zeolia, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); State v. Williamson, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); Dowdy, 894 S.W.2d at 305-06.

The trial court made the following findings at the conclusion of the alternative sentencing hearing:

The Defendant, Mr. Booker, has been sort of a . . . it’s almost like homecoming with Mr. Booker. He’s been sort of a fixture in the Court now for some time. I’ve noticed this about the Defendant through the years, and it was set out in report [sic] and his testimony today; he’s a very buoyant person. He seems to have an attitude about living, although it might be misguided, considering the amount of his life, and he certainly has a very loyal wife that must love him and that’s certainly a blessing, but Mr. Booker, you’re in the same position you’ve been in before. This is No. 4 felony for violating a Habitual Traffic Offender Order. You have a bushel of other offenses, lesser type offenses. Again, I’m not considering anything that was dismissed or it’s ill-defined or to that effect. Going all the way back to a juvenile, you’ve been just in continuous trouble. Social history is not good. I realize, lately, some of it, where you just worked one month after you got out of prison the last time, it might be because of your disability. It’s just got too much load on it for me to help you out. I’m going to deny probation.

....

Anyway, probation will be denied. I've also considered community corrections, residential. I don't see any hope, based on the report I have.

We have reviewed the record on appeal, and the defendant's criminal history is extensive. His first arrests occurred when he was a juvenile. Among those are burglary and violation of probation. As an adult he has convictions for public intoxication, several for driving with a revoked license, reckless driving, involved driver failing to stop at the scene of an accident, a few for driving under the influence of an intoxicant, and a few for being an habitual traffic offender, under the MVHO Act. These convictions began in 1986 and run to the present time.

The defendant was declared an habitual traffic offender in Shelby County in 1990. According to the pre-sentence report, the defendant has three convictions for being an habitual traffic offender which occurred before the conviction in question. He was charged and convicted with being an habitual traffic offender in 1997. He was sentenced to eighteen months and denied probation. He was granted determinate release in December of 1997 and transferred to Shelby County. The defendant was charged with being an habitual traffic offender in 1994 in Shelby County. He was not convicted for this charge until 1998. The defendant was sentenced to one year and released on determinate release probation. He successfully completed this probation period. His next conviction occurred in July of 2004. He was sentenced to two years and placed on probation on July 15, 2004. The defendant was then charged with the current offense about six weeks later on August 28, 2004. A probation violation warrant was issued and he pled guilty to violation of probation.

The defendant has been placed on probation twice for this exact same offense. The first time he completed probation successfully, but committed the same crime within six years. The second time he was placed on probation, he had been on probation about six weeks when he committed the crime again. Clearly, this is not a successful completion of probation. We conclude that "[m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." Tenn. Code Ann. § 40-35-103(1)(C). We find that the defendant's extensive criminal history combined with his recent lack of success in probation is sufficient to overcome a presumption for an alternative sentence. The trial court's decision to deny probation or any other alternative sentence option is fully supported by the record.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

JERRY L. SMITH, JUDGE